

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant :	Anders Magnusson	Art Unit :	3761
Patent No. :	7,481,805	Examiner :	Melanie Jo Hand
Issue Date :	January 27, 2009	Conf. No. :	5773
Serial No. :	10/606,538		
Filed :	June 26, 2003		
Title :	DRAINAGE CATHETER		

Commissioner for Patents  
P.O. Box 1450  
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**APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(d)**

Patentee hereby requests reconsideration of the Patent Term Adjustment (PTA) accorded the above-referenced patent. Reconsideration of the final PTA calculation to increase total PTA from 376 to 594 days, is respectfully requested.

**REMARKS**

"A Delays" are defined as delays by the U.S. Patent and Trademark Office (PTO) under 35 U.S.C. § 154(b)(1)(A), which guarantees prompt PTO response. "B Delays" are defined as delays by the PTO under 35 U.S.C. § 154(b)(1)(B), which guarantees no more than three year application pendency. To the extent that the periods of delay overlap, the period of any term adjustment shall not exceed the actual number of days the issuance of the patent was delayed. 35 U.S.C. § 154(b)(2)(A). As outlined in Wyeth et al. v. Jon W. Dudas (580 FSupp2d 138; 88 USPQ2d 1538), the only way that these periods of time can "overlap" is if they occur on the same day. If an "A delay" occurs on one calendar day and a "B delay" occurs on another calendar day, they do not overlap and 35 U.S.C. § 154(b)(2)(A) does not limit the extension to one day. Id.

The PTA for the instant patent, as currently calculated and shown on the face of the patent, apparently relies on the premise that the application was delayed under 35 U.S.C. § 154(b)(1)(B) *before* the initial three-year period expired. The Wyeth v. Dudas court determined that this construction cannot be squared with the language of

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35 U.S.C. § 154(b)(1)(B), which applies "if the issue of an original patent is delayed due to the failure of the United States Patent and Trademark Office to issue a patent within 3 years."

"B delay" begins only after the PTO has failed to issue a patent within three years, not before.

Id.

#### REVIEW OF PATENT TERM ADJUSTMENT CALCULATION

##### "A Delay"

A first PTO action was due on or before August 26, 2004 (the date that is fourteen months after June 26, 2003, the date on which the application was filed). The PTO mailed the first non-final Office Action on November 8, 2005, thereby according a PTO Delay of 439 days. Patentee does not dispute the PTO's calculation for this "A Delay" from August 27, 2004 (the day after the date that is fourteen months after the date on which the application was filed), to November 8, 2005. See 37 C.F.R. §§ 1.702(a)(1) and 1.703(a)(1).

In view of the period of "A Delay" detailed above, the total "A Delay" for this patent should be calculated as 439 days.

##### "B Delay"

The period beginning on June 27, 2006 (the day after the date that is three years after the date on which the application was filed), and ending January 27, 2009 (the date the patent was issued), is 946 days in length.

"B Delay" may not include the number of days in the period beginning on the date on which a Notice of Appeal was filed and ending on the date of mailing of a Notice of Allowance. In the present application, no Notice of Appeal was filed. See 37 C.F.R. §§ 1.702(b)(4) and 1.703(b)(4).

In addition, "B Delay" may not include the number of days in the period beginning on the date on which a Request for Continued Examination was filed and ending on the date the patent was issued. In the present application, a Request for Continued Examination was filed on

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June 11, 2007, and the patent issued on January 27, 2009, resulting in a period of 596 days that must also be excluded from the three year delay calculation. See 37 C.F.R. §§ 1.702(b)(1) and 1.703(b)(1).

"B Delay" for this patent is therefore calculated as 946 days minus 596 days, for a total of 350 days. The PTO calculated 0 days of delay for issuance of a patent more than three years after filing. Patentee respectfully submits that the PTO's calculation of this "B Delay" is incorrect and that the correct PTO Delay for issuance beyond three years from filing is 350 days.

#### Overlap of "A Delay" and "B Delay"

As detailed above, "A Delay" accumulated during the following period:

August 27, 2004, to November 8, 2005.

As detailed above, "B Delay" accumulated during the following period:

June 27, 2006, to June 11, 2007.

As such, the periods of "A Delay" and "B Delay" do not overlap (i.e., occur on the same calendar day).

#### Applicant Delay

A reply to an Office Action was due on or before February 8, 2006 (the date that is three months after November 8, 2005, the date on which the Office Action was mailed). Patentee filed a response to the Office Action on January 23, 2006, and an Applicant Delay of 0 days was accorded for this filing. In good faith and candor, Patentee notes that the next Office Action mailed by the Office on April 7, 2006, indicated that the reply filed in January 2006 was not fully responsive. Patentee filed a fully responsive reply immediately thereafter on April 26, 2006. As such, Patentee respectfully submits that an Applicant Delay of 93 days should have been calculated for this sequence of filings, from January 24, 2006 (the day after the date on which the reply having an omission was filed), to April 26, 2006 (the date on which the reply correcting the omission was filed). See 37 C.F.R. § 1.704(c)(7).

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A reply to an Office Action was due on or before April 3, 2007 (the date that is three months after January 3, 2007, the date on which the Office Action was mailed). Patentee filed a response to the Office Action on May 3, 2007, thereby according an Applicant Delay of 30 days. Patentee does not dispute the PTO's calculation for this Applicant Delay from April 4, 2007 (the day after the date that is three months after the date on which the Office Action was mailed), to May 3, 2007. See 37 C.F.R. § 1.704(b).

A reply to an Office Action was due on or before November 30, 2007 (the date that is three months after August 30, 2007, the date on which the Office Action was mailed). Patentee filed a response to the Office Action on January 2, 2008, thereby according an Applicant Delay of 33 days. Patentee does not dispute the PTO's calculation for this Applicant Delay from December 1, 2007 (the day after the date that is three months after the date on which the Office Action was mailed), to January 2, 2008. See 37 C.F.R. § 1.704(b).

In view of the periods of Applicant Delay detailed above, the total Applicant Delay for this patent should be calculated as 156 days (i.e., the sum of 93 days, 30 days, and 33 days).

#### Terminal Disclaimer

This patent is not subject to a terminal disclaimer.

#### Conclusion

In consideration of the events described above, Patentee believes the PTA calculation of 376 days is incorrect. As such, Patentee respectfully requests reconsideration of the PTA in the following manner:

- 1) Total PTO Delay should be calculated as 789 days (i.e., the sum of 439 days of "A Delay" and 350 days of "B Delay");
- 2) Total Applicant Delay should be calculated as 156 days; and
- 3) Total PTA should be calculated as 633 days.

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The fee of \$200 required under 37 C.F.R. § 1.18(e) is being submitted herewith. Please apply any other required charges or credits to Deposit Account No. 06-1050, referencing attorney docket number 12389-0004001.

Respectfully submitted,

Date: 3/27/09

/Kirk Dorius/

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